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CCI TECHNOLOGY SDN BHD & ORS v. PERNEC EBIZ SDN BHD

COURT OF APPEAL, PUTRAJAYA
BALIA YUSOF WAHI JCA
MAH WENG KWAI JCA
B BADARIAH SAHAMID JCA
[CIVIL APPEAL NO: W-02-2638-12-2013]
6 JANUARY 2016

C ***CIVIL PROCEDURE:*** *Injunction – Ad interim injunction – Plaintiff obtained ad interim injunction order against defendants – Plaintiff seized goods and monies belonging to defendants – Ad interim injunction order set aside by High Court – Absence of specific order of High Court in respect of return of goods and monies seized – Whether appellate court had power to order return of seized goods and monies to defendants as consequential relief*

D The respondent ('the plaintiff') filed a suit against the appellants ('the defendants'). In the meantime, the plaintiff obtained two *ad interim* injunctions against the first to fourth defendants ('the two injunctions orders'). Pursuant to the two injunction orders, the plaintiff seized and took possession of goods and monies that were the subject matter of the two E injunction orders. Subsequently, the plaintiff's claim was dismissed with cost after full trial. The trial judge also set aside the two injunction orders. However, no consequential order was made in respect of the return of the goods and monies seized. The defendants therefore demanded from the plaintiff for the return of the goods and monies seized, but the plaintiff failed F to return the same as well as to pay costs awarded by the High Court to the defendants. The defendants thus made an application *vide* encl. 98 for the return of the goods and monies seized. The Judicial Commissioner ('JC') dismissed the defendants' application. Hence, the present appeal. The issues that arose for determination was whether this court had the power to order G the return of seized goods and monies to the defendants as a consequential relief, in the absence of a specific order of the High Court to do the same.

Held (allowing appeal with costs)
Per Badariah Sahamid JCA delivering the judgment of the court:

H **(1)** When goods were seized pursuant to an injunction order and that injunction order was subsequently set aside, the standard practice was to order consequential relief for the return of the goods seized pursuant to the injunction order. Any assessment of damages ordered in addition thereto was to address any losses suffered by the defendant for the seizure of the goods. (para 38)

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(2) To permit the plaintiff to retain goods and monies seized under injunction orders which had been set aside went against established principles of law, equity and justice. The principle of *restitution in integrum* applied to put parties back as nearly as may be before the grant of the two injunction orders. Since the plaintiff's suit had been dismissed and the injunction orders set aside, there was no legal or equitable basis to permit the plaintiff to retain the goods and monies seized. To do so would clearly be an unjust enrichment to the plaintiff and highly detrimental to the defendants. Therefore, the plaintiff was ordered to return to the defendants the goods and monies seized under the two injunction orders or *in lieu* thereof an assessment of damages by the Registrar of the High Court. (paras 39 & 42)

Bahasa Malaysia *Translation*

Responden ('plaintif') memfailkan satu tindakan guaman terhadap perayu ('defendan'). Sementara itu, plaintif memperolehi dua injunksi *ad interim* terhadap defendan pertama hingga defendan keempat ('kedua-dua perintah injunksi'). Berdasarkan kedua-dua perintah injunksi, plaintif merampas dan mengambil alih barangan dan wang yang membentuk hal perkara kedua-dua perintah injunksi. Kemudian, tuntutan plaintif ditolak dengan kos selepas perbicaraan penuh. Hakim bicara juga mengetepikan kedua-dua perintah injunksi. Walau bagaimanapun, tiada perintah berbangkit dibuat bagi pemulangan barangan dan wang yang dirampas. Defendan, oleh itu, menuntut daripada plaintif pemulangan barangan dan wang yang dirampas tetapi plaintif gagal memulangkannya dan juga gagal membayar kos yang diawardkan oleh Mahkamah Tinggi kepada defendan. Oleh itu, defendan membuat permohonan melalui lamp. 98 bagi pemulangan barangan dan wang yang dirampas. Pesuruhjaya Kehakiman ('PK') menolak permohonan defendan. Dengan itu, rayuan ini. Isu-isu yang dibangkitkan untuk pertimbangan adalah sama ada mahkamah ini mempunyai kuasa untuk memerintahkan pemulangan barangan dan wang yang dirampas kepada defendan sebagai relif berbangkit, walaupun tanpa perintah spesifik oleh Mahkamah Tinggi untuk melakukan demikian.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Badariah Sahamid HMR menyampaikan penghakiman mahkamah:

(1) Apabila barangan dirampas menurut satu perintah injunksi dan perintah injunksi kemudiannya diketepikan, amalan biasa adalah untuk memerintahkan relif berbangkit bagi pemulangan barangan yang dirampas berdasarkan perintah injunksi tersebut. Apa-apa penilaian ganti rugi tambahan adalah untuk menangani apa-apa kerugian yang dialami oleh defendan akibat rampasan barangan tersebut.

(2) Membenarkan plaintif menyimpan barangan dan wang yang dirampas di bawah perintah injunksi yang diketepikan adalah bertentangan dengan prinsip undang-undang mantap, ekuiti dan keadilan. Prinsip *restitution in integrum* terpakai untuk meletakkan pihak-pihak kembali pada kedudukan seberapa hampir yang mungkin dengan keadaan sebelum pemberian kedua-dua perintah injunksi tersebut. Oleh kerana tindakan guaman plaintif telah ditolak dan perintah injunksi diketepikan, tiada asas undang-undang atau ekuiti untuk membenarkan plaintif menyimpan barangan dan wang yang dirampas. Berbuat demikian dengan jelas akan menjadi pengkayaan tidak patut buat plaintif dan sangat memudaratkan defendan. Oleh itu, plaintif diperintah memulangkan kepada defendan barangan dan wang yang dirampas di bawah kedua-dua perintah injunksi atau sebagai gantinya penilaian ganti rugi oleh Pendaftar Mahkamah Tinggi.

Case(s) referred to:
Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors [2006] 1 CLJ 1 CA ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 69(1), (4)
Rules of Court 2012, O. 42 r. 13, O. 92 r. 4

For the appellants - Charanjit Singh Saini; M/s CS Saini & Assocs
For the respondent - Ahmad Syiimir Suffian; M/s Azmi & Assocs

[Editor's note: For the High Court judgment, please see Pernec Ebiz Sdn Bhd v. CCI Technology Sdn Bhd & Ors [2012] 1 LNS 67 (overruled)]

Reported by Sandra Gabriel

JUDGMENT

Badariah Sahamid JCA:

Brief Background Facts

[1] The parties are referred to as they were in the proceedings before the High Court.

[2] The plaintiff had filed a suit against seven defendants for, *inter alia*, breach of contract, breach of fiduciary duty and dishonest conduct of a former employee. The first defendant filed a counterclaim.

[3] Subsequently, the plaintiff applied for an injunction against all the defendants.

[4] The application for injunction against the fifth, sixth and seventh defendants were withdrawn before the commencement of the suit.

[5] However, the plaintiff maintained the application for injunction against the first to the fourth defendants.

[6] The plaintiff obtained two *ad interim* injunctions against the first to the fourth defendants dated 2 December 2008 and 27 October 2009 ('the two injunctions orders') (Refer to pp. 56 to 63 jilid 2 bahagian B rekod rayuan).

[7] Pursuant to the two injunction orders abovementioned, the plaintiff, their servants and/or agents seized and took possession of payphones, equipment, spare parts, computers, monies and other items that were the subject matter of the two injunction orders abovementioned.

[8] The plaintiff's suit proceeded for trial before Justice Hamid Sultan. At the close of the plaintiff's case, the defendants' counterclaim was struck off with liberty to file afresh. The plaintiff's claim was dismissed with costs after full trial.

[9] The trial judge also set aside the two injunction orders against the first to the fourth defendants. No consequential order was made in respect of the return of the goods and monies seized pursuant to the two injunction orders. The learned trial judge's grounds of judgment was dated 27 January 2012.

[10] The plaintiff has appealed to the Court of Appeal against the decision of the learned High Court Judge. This appeal is still pending.

[11] By a letter dated 27 April 2012, the defendants' solicitors demanded from the plaintiff the return of the goods and monies seized pursuant to the two injunction orders.

[12] However, the plaintiff has failed to return the goods and monies seized as well as to pay costs awarded by the High Court to the defendants.

Enclosure 98

[13] By saman dalam kamar dated 18 June 2012 (encl. 98) the defendants made an application for the return of the goods and monies seized pursuant to the two injunction orders set aside by the trial judge on 27 January 2012.

[14] In encl. 98, among the reliefs sought by the defendants were:

> 1. Bahawa Plaintif pekerja-pekerja dan/atau agen-agen mereka mengembalikan kepada Defendan Pertama barang-barang berikut yang telah diambil milik oleh Plaintif pekerja-pekerja dan/atau agen-agen mereka dari Defendan Pertama menurut Injunksi *Ad Interim* bertarikh 2hb Disember 2008 dan Perintah Mahkamah bertarikh 27hb Oktober, 2009 iaitu:
>
> (i) 2640 unit payphones jenis Tatung GSM Model TT698
>
> (ii) Alat ganti yang disenaraikan (jumlah RM22,169)
>
> (iii) 4 unit computer laptop jenis Dell model Q 510519-DELL, XPS M1210

(iv) 4 unit Logitech QuickCam Go (Black)

(v) Wang tunai dalam peti tunai dan penyerahan wang kepada wakil Plaintif berjumlah RM143,800.00

(vi) Semua barang yang lain apa pun dan lain barang apa sahaja dan dimana jua yang telah dirampas dan diambil milik oleh Plaintif, pekerja dan /atau agen-agen mereka;

2. Secara alternative bahawa Plaintif membayar Defendan Pertama harga kesemua barang diatas dan/atau nilainya dan kembalikan semua wang yang telah dirampas oleh Plaintif pekerja-pekerja dan/ atau agen-agen mereka dari telepon awam Defendan Pertama.

[15] On 31 October 2013, the learned Judicial Commissioner (JC), Justice Asmabi dismissed the defendants' application in encl. 98 with costs.

[16] This appeal before us is against the decision to dismiss encl. 98.

Dismissal Of Encl. 98

[17] The findings and decision of the learned JC may be summarised as follows.

[18] The judgment by the learned High Court Judge on 21 January 2012 was delivered on merits after full trial of the suit. It is an established principle of law that once an order of the court has been drawn up and perfected, the court is *functus officio* and has no power to set it aside.

[19] When the learned High Court Judge set aside the two injunction orders, there were no consequential orders made for the return of the goods and monies seized pursuant to the two injunction orders. It is not open to the defendants to read what was not reflected in the learned High Court Judge's grounds of judgment.

[20] The learned High Court Judge had made an order for the defendants to be compensated by an assessment of damages by an officer of the court. Thus, the defendants' relief is only the entitlement to damages.

[21] The court has no power to vary, alter or set aside any judgment or order drawn and perfected except under the slip rule in compliance with O. 42 r. 13 of the Rules of Court 2012. The defendants' application does not comply with the order abovementioned.

[22] The defendants' application under encl. 98 cannot be construed as an application falling within the terminology "liberty to apply". This is applicable where the terms of the order are not clear for purposes of enforcement and an application is made to clarify any uncertainty. It is not applicable to the instant case where no consequential orders were made in respect of the seized goods and monies.

[23] Once a court of competent jurisdiction had pronounced final judgment on merits, it is conclusive and the principle of *res judicata* would apply as an absolute bar to re-litigating any subsequent action premised on the same claim.

[24] The defendants' application in encl. 98 is an abuse of the process of court.

Issues

[25] The primary issue before us is whether this court has the power to order the return of seized goods and monies to the applicants as consequential relief, in the absence of a specific order of the High Court to do the same.

Findings And Decision

[26] After due consideration of parties' oral and written submissions, relevant provisions and authorities, we are of the unanimous opinion that there is merit in this appeal warranting appellate intervention.

[27] We therefore allow the appeal and set aside the decision of the learned JC. We also make an order for the plaintiff to return to the defendants the goods and monies seized under the two injunction orders or *in lieu* thereof for the plaintiff to pay damages to be assessed by the Registrar of the High Court.

[28] The grounds of our decision are as follows.

[29] In his grounds of judgment, the learned High Court Judge dismissed the plaintiff's claim. In the course of his judgment the learned judge had remarked that, "the injunction was wrongly procured and ought to be set aside *in limine*".

[30] However, in setting aside the two injunction orders, the learned High Court Judge made no reference to the goods and monies seized under the injunction orders.

[31] Should the learned High Court Judge have made such orders as consequential relief on the setting aside of the injunction orders? We think so.

Hearing Of Appeals

[32] The Court of Appeal is vested with wide powers in respect of the High Courts. Section 69(1) of the Courts of Judicature Act 1964 (Act 91) provides:

> Appeals to the Court of Appeal shall be by way of re-hearing, and in relation to such appeals the Court of Appeal shall have all the powers and duties, as to amendment or otherwise, of the High Court, together with full discretionary power to receive further evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner.

[33] Further, sub-s. (4) provides:

> The Court of Appeal may draw inferences of fact, and give any judgment, **and make any order which ought to have been given or made, and make such further or other orders as the case requires**. (emphasis added)

[34] In the case of *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 CLJ 1; [2006] 1 MLJ 710, Gopal Sri Ram JCA in delivering the judgment of the Court of Appeal had occasion to remark on the purpose of s. 69(4) abovementioned as to do justice between the parties.

[35] In the *Leong Kum Whay*'s case, the arbitrator had awarded interest on the sum claimed on an insurance policy only from the date of the award and not from the date of the accident. No reasons were given by the arbitrator for the departure from the established principle of awarding interest on a debt.

[36] In such situations, ordinarily the court could remit the award to the arbitrator with the appropriate direction. However, the arbitrator had passed away with the result that no remitting order could be made. His Lordship observed:

> It is to meet such situations as the present that s. 69(4) of the Courts of Judicature Act, 1964 was designed to meet. That section empowers us to "make any order which ought to have been given or made, and make such further or other orders as the case requires". The section enables this court to do complete justice between the parties (see *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil s/o Pereira & Ors* [1996] 3 MLJ 489, *Kumpulan Perangsang Selangor Bhd v. Zaid bin Hj Mohd Noh* [1977] 1 MLJ 789 (FC).

[37] In addition, the court is invested with inherent powers pursuant to O. 92 r. 4 of the Rules of Court 2012 which provides as follows:

> For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[38] Drawing a parallel to the instant case: when goods are seized pursuant to an injunction order, and that injunction order is subsequently set aside, the standard practice is to order consequential relief for the return of the goods seized pursuant to the injunction order. Any assessment of damages ordered in addition thereto is to address any losses suffered by the defendants for the seizure of the goods.

[39] To permit the plaintiff to retain goods and monies seized under the injunction orders which had been set aside goes against established principles of law, equity and justice. The principle of restitution *in integrum* applies to put parties back as nearly as may be before the grant of the two injunction orders. Since the plaintiff's suit has been dismissed and the injunction orders set aside, there is no legal or equitable basis to permit the plaintiff to retain the goods and monies seized. To do so would clearly be an 'unjust enrichment' to the plaintiff and highly detrimental to the defendants.

[40] The plaintiff has demonstrated a clear disregard of the rights of the defendants in respect of the seized monies and goods. At the trial of the suit, the plaintiff's witnesses confirmed the goods were no longer in the possession, custody and control of the plaintiff. The said goods had been refurbished and handed to a subsidiary of the plaintiff, Pernec Paypoint Sdn Bhd which runs a business as a payphone operator.

[41] To allow the plaintiff to remain in possession of the goods and monies of the defendants and to profit from them is clearly repugnant and a flagrant abuse of the process of court.

[42] Thus, we allow this appeal and set aside the decision of the learned JC. We order the plaintiff to return to the defendants the goods and monies seized under the two injunction orders or *in lieu* thereof an assessment of damages by the Registrar of the High Court. We order costs of RM10,000 to the appellants and deposit to be refunded to the appellants.